

NO. 48673-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

B.S.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated juvenile appellant's due process rights by refusing to order the State to provide the services ordered as part of a disposition under the Juvenile Justice Act (JJA). CP 33-34.

Issue Pertaining to Assignment of Error

As part of a disposition imposed under the JJA for assaulting her mother, appellant is required to comply with various conditions and the State is required to provide appellant with various services, including "Anger Management or Aggression Replacement Therapy ('A.R.T.')." Did the trial court violate appellant's due process right to the treatment ordered in her disposition by refusing to order the State to provide her with Anger Management/A.R.T.?

B. STATEMENT OF THE CASE

The Thurston County Prosecutor charged juvenile appellant B.S. (d.o.b. 9/8/01), with third degree assault. CP 6. The State alleged that on July 26, 2015, B.S. assaulted her mother by throwing a knife at her after her mother refused to let her use WiFi. CP 2-4.

On August 6, 2015, B.S. pleaded guilty as charged. CP 7-12. As part of the plea, B.S. acknowledged the State would recommend she serve 12 months on probation, get credit for time served, serve 32 hours of

community service, that she engage in "A.R.T." and engage in any other treatment recommended by probation. CP 11.

A disposition order was entered following acceptance of B.S.'s plea. CP 13-18. The court imposed a standard range disposition of 12 months of community supervision, 24 hours community service work, and 11 days in confinement, with credit for 11 days served. CP 14-15. The court also imposed several conditions of supervision, including committing no new offenses, attending school, reporting regularly to probation, following all directives of probation, abstaining from alcohol and nonprescription drugs, participating in a "Washington State Risk Assessment" and complying with the resulting recommendations. CP 16-17. The court also directed that B.S. "be evaluated for and comply with all treatment recommendations of Anger Management or Aggression Replacement Therapy ('A.R.T.')." CP 16.

Following entry of the disposition order on August 6, 2015, several modification hearings were held, as summarized below:

<u>Date</u>	<u>Basis</u>	<u>Result</u>
08/25/15	B.S. dented Mom's car and hit Mom ¹	3 days jail
09/17/15	B.S. hit Mom with Mom's cell phone ²	see 09/21-23/15
09/21-23/15	B.S. refusal to attend school ³	4 days jail

¹ CP 45-46.

² CP 47-48.

10/19/15	B.S. refusal to complete school work ⁴	see 10/22/15
10/22/15	B.S. refusal to participate in MST ⁵ intake ⁶	4 hours CS
10/29/15	B.S. tore towel rack off wall at home ⁷	1 day jail
01/08/16	B.S. swore at teacher and got suspended ⁸	see 01/12/16
01/12/16	B.S. hit Mom ⁹	4 days jail
01/20-22/16	B.S. tardy to school ¹⁰	see 01/27/16
01/27/16	B.S. hit Mom ¹¹	8 days jail
02/23/16	B.S. hit Mom/curfew viol/threaten damage ¹²	see 02/24/16
02/24/16	B.S. hit Mom ¹³	9 days jail

³ Id.

⁴ CP 49-50.

⁵ "MST" presumably refers to "Multisystemic Therapy," which according to one web site:

is an intensive family- and community-based treatment program that focuses on addressing all environmental systems that impact chronic and violent juvenile offenders -- their homes and families, schools and teachers, neighborhoods and friends. MST recognizes that each system plays a critical role in a youth's world and each system requires attention when effective change is needed to improve the quality of life for youth and their families.

<http://mstservices.com/> (as of July 28, 2016). See also RP 24 (B.S.'s counsel uses the phrase "multisystemic therapy").

⁶ CP 49-50.

⁷ CP 51-52.

⁸ CP 53.

⁹ Id.

¹⁰ CP 54-59.

¹¹ Id.

¹² CP 31-32.

¹³ Id.

CP 19-30, 33-34.

B.S. did not contest the alleged violations. After the State filed the notice of violation on February 24, 2016, however, her counsel did file a response arguing sanctions for B.S.' most recent violations are unwarranted in light of the State's failure to provide her with the opportunity to engage in A.R.T., as ordered at disposition. CP 35-36.

A hearing on the February 2016 violations was held February 26, 2016, before the Honorable Christine Schaller. RP¹⁴ 1-30. B.S. stipulated to committing the alleged violations. RP 3. The court examined B.S.'s MST therapist, Jessica Pickert, under oath.

According to Pickert, MST involves meeting two to three times a week with a family to globally address issues. RP 9, 11. Pickert noted, however, that B.S.'s mother's health made it difficult to meet as often as required, which hampered its effectiveness for B.S. RP 9, 17-18.

Pickert was familiar with A.R.T., but not well enough to explaining the difference between it and MST. RP 10-11. Pickert recalled MST was employed instead of A.R.T., however, because it was too difficult for B.S. to attend the A.R.T. program in light of problems with transportation, which was the main barrier to B.S. engaging in that service.

¹⁴ The single volume of verbatim report of proceeding associated with this appeal is cited herein as "RP."

RP 11, 23. Pickert also noted MST would soon conclude, and she was discussing with B.S.' mother engaging the family in "WISe Services." RP 11-12.

Following Pickert's testimony, B.S.' counsel argued the court should not impose sanctions, but instead order the State to comply with the disposition order and do whatever necessary to engage B.S. in A.R.T. "or some other individualized anger management therapy." RP 24-25. The trial court refused. Instead, the court noted that had the State pursued new charges instead of a probation violations based on the recent behavior, B.S. would be looking at a substantial amount of incarceration time. RP 26, 28. The court also rationalized that because B.S. had transportation problems with attending A.R.T., probation appropriately offered MST instead, despite having similar issues with that program. RP 27. The court concluded by ordering B.S. to serve nine days incarcerated. CP 33-34; RP 28. B.S. seeks review. CP 41-43.

C. ARGUMENT

THE JUVENILE COURT'S REFUSAL TO ORDER THE STATE TO PROVIDE B.S. WITH A.R.T. SERVICES VIOLATES B.S.' DUE PROCESS RIGHTS.

The State's failure to provide appropriate services under the terms of the disposition order violates due process and hampers B.S.'s ability to complying with her own obligations under the disposition order. As a

result, B.S. was sanctioned for violations she may otherwise not have committed. This Court should order the State to provide B.S. with A.R.T., as directed by the trial court at disposition.

a. B.S. Has a Due Process Right To Receive A.R.T.

The JJA creates a statutory duty to provide appropriate treatment, which are determined by the specific needs of the offender. State v. S.H., 75 Wn. App. 1, 20, 877 P.2d 205 (1994); State v. J.N., 64 Wn. App. 112, 117, 823 P.2d 1128 (1992). In addition, juvenile offenders have a right to adequate treatment under the due process clause of the Fourteenth Amendment of the United States Constitution. S.H., 75 Wn. App. at 19 (citing Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir.) cert. denied, 417 U.S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146 (1974)). Due process protects individual interests implicating life, liberty, or property. Washington Fed'n of State Employees v. State, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995).

B.S. was entitled to be evaluated for A.R.T. because it was ordered as part of her disposition. CP 13-18. The obvious intent of the court in ordering B.S. be evaluated for A.R.T. was to further her liberty interest by reducing her tendency to act out in anger and commit crimes as a consequence. Her interest in A.R.T. treatment, therefore, is protected by

the Fourteenth Amendment. Washington Fed'n of State Employees, 127 Wn.2d 558; S.H., 75 Wn. App. at 19.

b. The State Failed to Provide A.R.T.

B.S. has anger management issues, as evidenced by her violation history between August 2015 and February 2016. The trial court recognized this in August 2015 and therefore ordered an Anger Management/A.R.T. evaluation and follow-up treatment. CP 16.

It is also apparent the State never complied with the directive to provide B.S. with A.R.T. services, as the State never asserted it had, despite, as the court recalled at the February 2016 hearing, B.S.'s specific request she be provided A.R.T. See RP 26 (court notes there was an issue about A.R.T. versus MST at the prior violation hearing).

c. This Court Should Remand with the Directive that the State Provide B.S. with A.R.T.

Although undersigned counsel can find no published or unpublished decision in Washington identifying the proper remedy under the circumstances, it seems axiomatic that if B.S. has a constitutionally protected interest in receiving the services ordered as part of her disposition, then the State should be directed to provide her with an A.R.T. evaluation and any resulting recommended treatment, as set forth in the disposition order. CP 16.

d. Review is Warranted, Despite Likely Mootness

Unfortunately, B.S. will likely complete her obligations under the disposition order well before this Court decides her appeal, raising the question whether her appeal is moot. A case is moot where the reviewing court no longer may grant the appealing party effective relief. Hart v. Dept. of Social and Health Servs., 111 Wn.2d 445, 447, 759 P.2d 1206 (1988); Washington Insurance v. Mullins, 62 Wn. App. 878, 887-88, 815 P.2d 840 (1991).

This Court should decide the matter anyway because the error at issue is "capable of repetition, yet evading review." In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992) (quoting Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 713, 35 L. Ed. 2d 147 (1973)). As this case demonstrates, because B.S. has only a 12-month long obligation under the August 2015 disposition order, a contested violation hearing six months in to that period is likely to evade effective appellate review because by the time the matter is ready for a decision by the appellate court, the disposition period has expired.

D. CONCLUSION

For the reasons stated, this Court should remand so the State can provide B.S. with the services ordered under her JJA disposition.

DATED this 11th day of August 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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